Fair Political Practices Commission

MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

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Subject: Legislative Options Responsive to Mass Litigation under section 91007

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Executive Summary

At its monthly meetings in July and September, the Commission conducted public hearings regarding a recently-presented bundle of demands for civil action under section 91007, which required staff to investigate claims against more than 900 "major donors" said to have violated the Act's reporting rules.[1] The Commission discussed the problems associated with such voluminous demands, which by law must be processed within 120 days. At the September meeting, the Commission directed staff to return with proposals for legislative amendments that would preserve the private right of action underlying these "120-day demands," but would moderate the impact of exceptionally numerous demands on both Commission staff and on the named respondents, many of whom appear to have been wrongly accused.

This memorandum responds to the Commission's instruction, beginning with a summary of the current law and its legislative history, along with a survey of prior actions under section 91007, the Commission's establishment of a "streamlined major donor" program in response to a prior episode of similar demands, and an assessment of the real difficulties caused by unusually voluminous demands under section 91007. The memorandum then surveys a number of options for legislative change, and recommends a combination of three proposals that staff believes will limit large scale "entrepreneurial" misuse of section 91007, without otherwise restricting private rights of action that have been part of the Act since its inception.

Staff proposes amendments to section 91007, to limit the number of "120-day demands" filed by any person or group of persons acting in concert, and to require simultaneous, actual notice of the demand to the persons accused therein. Staff also recommends amendment of section 91004, to add language directing the courts to take into consideration Commission policies and practices applicable to these reporting violations.

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[1] Statutory references are to provisions of the Political Reform Act (the "Act"), Gov't Code sections 81000-91014.

I

BACKGROUND

A. Current Law

In June the Commission learned of a private civil action initiated under section 91007, in which plaintiff Norm Ryan alleged that hundreds of defendants had violated the Act's major donor reporting rules. A "major donor" is defined at section 82013(c) as any person who contributes a total of $10,000 or more to or at the behest of candidates or committees during a calendar year. Even if not otherwise qualified as a "committee" under the Act, a major donor must file a report disclosing these contributions, as outlined at sections 84200 *et seq*. Failure to timely file such a report is a violation of the Act.

When made aware through investigation, audit, or complaint that a major donor has failed to timely file a required report, the Commission may prosecute the violation administratively, or it may proceed "civilly" by filing a lawsuit in state court after following the procedures described at sections 91000 *et seq*. To encourage compliance with reporting requirements, section 91004 also allows prosecution of these violations by "any person residing within the jurisdiction." This so-called "private attorney general" option encourages prosecution of violations when public agencies charged with that responsibility are, for any reason, unable or unwilling to act.

Section 91007 provides the Commission with a "right of first refusal" on any such civil action by requiring that, before filing a civil action under section 91004, the prospective plaintiff must first file a written request that the Commission itself commence a civil lawsuit, along with a statement of reasons for believing that grounds for prosecution exist. If the Commission accepts this tender and files suit within 120 days, private civil actions on the same claim are barred while the Commission's action is pending. (Section 91007(a).)

If the Commission chooses *not* to initiate a civil action after notice under section 91007, private civil actions are available for violations of section 91004, as alleged in the Ryan action. Recognizing the possibility that *several* lawsuits based on the same violation might be initiated by private litigants, section 91008 provides that no more than *one* judgment on the merits may be obtained for any given violation. The earliest-filed private action generally has priority over subsequent lawsuits, and later-filed actions will be dismissed once judgment has been entered (or a settlement approved by the court) on the prior action.

Consistent with the principle evidently underlying section 91008 – that there should be only one remedy for any given violation – section 91008.5 bars the filing of any civil action under section 91004 after the Commission has decided the claim administratively. The statute is however silent as to the preclusive effect of an administrative adjudication entered *after* a private civil action has been filed in full compliance with the statutory process described above.

In summary, the statutory scheme pertinent to the Ryan litigation requires that the Commission have "right of first refusal" on the civil prosecution of any reporting violation, and bars the filing of private civil actions *after* an administrative adjudication, but otherwise permits civil lawsuits by private litigants when the Commission declines to initiate its own lawsuit.[2] The Act discourages multiple civil actions on the same cause of action by barring multiple judgments on a single cause of action, and adds an express fee-shifting statute (section 91012) that should operate to shield defendants in private civil actions from abusive prosecution. Section 91012 not only permits parties to recover reasonable attorney's fees as costs of litigation, but provides that: "On motion of any party, a court shall require a private plaintiff to post a bond in a reasonable amount at any stage of the litigation to guarantee payment of costs."

Because there are thousands of "major donors" who may be in violation of the Act at any given time, a monetary incentive for private prosecution is also an incentive for compliance with the Act. But in the current matter, as occasionally in the past, the presentation of a very large number of "120-day demands" strains Commission resources, arguably resulting in proceedings against persons who, upon reasonable investigation, should not have been prosecuted. There is a sense in some quarters that mass prosecutions under section 91004 may be partisan in their aims, or involve unwholesome "profiteering" rather than genuine concern for the public interest. In some cases these private civil actions may be perceived as a form of "extortion" carried out under color of law in much the same fashion as the "unfair competition" lawsuits against small businesses that resulted last year in sanctions against the law firms that filed them. There is also a concern that widespread citizen prosecution of filing violations may undermine Commission policies for the management of such cases, because individual courts are not bound to follow Commission policies for handling these violations.

B. Legislative History

Since its beginning in Proposition 9 (1974), the Act has expressly provided for supplementing governmental enforcement by creating private rights of action in sections 91000 *et seq*. Among the Act's original findings and declarations, still codified at section 81001(h), is the observation that previous laws in this area have suffered from inadequate enforcement by state and local authorities. Section 81002(g) accordingly provided that: "Adequate enforcement mechanisms should be provided to public officials *and private citizens* in order that the Act may be vigorously enforced. (Emphasis added; codified at section 81001(f) following amendments elsewhere in this section in 1980.)

In 1984, section 91008.5 was added to the Act by SB 1438 (Craven), which provided that no civil action may be filed on a claim under sections 91004, 91005, or 91005.5 after the Commission has issued an administrative adjudication on that complaint. This legislation was sponsored by the Commission to eliminate the duplicative penalties that might follow an

[2] A private attorney general is entitled to fifty percent of any amount recovered which, in the case of a reporting violation, can range up to the full amount of the amount not reported. (Sections 91009, 91004.)

administrative fine if a private citizen filed a lawsuit seeking to recover damages for the same violation. SB 1438 was passed over arguments that it would weaken the Act by barring citizen response to inadequate or "friendly" settlements.

A private citizen wishing to sue under the original version of section 91007 was required to offer a "right of first refusal" that gave the civil prosecutor 40 days in which to decide whether to bring its own action and, if the civil prosecutor timely announced its intention to do so, it had an additional 40 days within which to file the lawsuit. When the civil prosecutor filed its action within this statutory time frame, private citizens were barred from filing their own actions unless the lawsuit by the civil prosecutor was dismissed without prejudice.

AB 1274 (Frusetta) amended section 91007 to combine the two 40-day periods into a single 120 day period for filing a civil lawsuit in response to a written citizen demand. The bill was an urgency measure and became effective in September of 1999. It was Commission-sponsored legislation conceived in light of experience with lawsuits by Tony Miller (see below) which demonstrated that 40 days was not sufficient to gather relevant documents and adequately investigate a complaint before filing a civil action. The Commission had found it difficult even to obtain bank records within 40 days, and concluded that additional time for review of the merits of a citizen complaint would allow more sensible and just allocation of enforcement resources.

C. The Bipartisan Commission Report's Recommendations

In 2000, after the foregoing amendments had become law, the Bipartisan Commission on the Political Reform Act of 1974 issued a report on topics that included enforcement of the Act. The Bipartisan Commission was especially critical of private civil actions under section 91007, and broadly concluded that the purposes of the Act were furthered by such lawsuits only when the violations were "serious," a term deliberately left vague to discourage prosecution of all but the most egregious violations. More specifically, the Bipartisan Commission included in its Final Report and Recommendations four legislative proposals intended to deter over-zealous enforcement of the Act by private citizens:

Recommendation 25: Limit private attorney general actions to "serious" violations of the Act.

Recommendation 26: Amend section 91012 to overrule by legislation a series of judicial decisions that have awarded fees "on the ground that the purpose of the attorney's fees provision is to encourage private litigation enforcing the Political Reform Act."

Recommendation 27: Private attorney general actions should be disallowed where the FPPC is pursuing the violation. The FPPC would notify the complainant that it is investigating the complaint and if within one year the FPPC has either entered into a stipulation or has entered an order of probable cause, a private civil lawsuit would be barred.

Recommendation 28: Citizen lawsuits would be barred if the FPPC has issued a warning letter to the respondent.

D. Recent Demands under section 91007

A review of 120-day demands under section 91007 shows that isolated demands are received periodically that claim a variety of different violations. Claims regarding "major donor" violations tend to be bundled together into large groups of claims presented to the Commission within a short space of time.

In the Ryan litigation more than 900 separate 120-day demands were presented to the Commission for investigation of activities that Mr. Ryan classified as violations of the major donor disclosure requirements. Commission staff was unable to investigate and resolve these claims within the required time, whereupon Mr. Ryan filed a single lawsuit in Los Angeles County Superior Court. During the early stages of this litigation, plaintiff dismissed roughly 700 (about 75%) of these claims, and the matter was transferred to the Complex Litigation branch of that court, where an initial status conference will be held in October to determine how the court will proceed with the remaining claims.

During 1999, the Commission received slightly over 300 major donor claims, 207 of them filed as 120-day demands by former Acting Secretary of State Tony Miller. Of these, 144 (about 70%) were closed for insufficient evidence. Settlements amounting to $98,450 were reached in the cases that could be prosecuted. Mr. Miller's activities were praised by some, and his own comments indicate that he had been prompted by a 1998 state auditor's finding that the Commission's enforcement actions were too often dictated by staff availability, leaving some violations un-prosecuted due to lack of agency resources. Others found this private action troubling, thinking it unfair that Mr. Miller had singled out violations that cause relatively little harm to the public interest, and/or pointing with suspicion to the potentially large financial benefit to private citizens who took on the role of public prosecutor.

Apart from these two instances of mass litigation, the Commission has in recent years fielded a number of 120-day demands on individual cases. Thus California Common Cause filed a civil demand against the American Civil Rights Coalition which had failed to itemize $1.5 million in contributions. The Commission sued in that case and reached a settlement of $95,000 earlier this year. A number of respondents, including then-Senator Ross Johnson, made demands relating to Lt. Governor Cruz Bustamante and his committees, alleging contributions accepted in excess of limits and run through an incorrect bank account in the weeks leading up to the October 2003 gubernatorial election. The Commission sued and reached a $263,000 settlement in this case. In the same year the Commission also took up a demand relating to Californians Against Government Run Healthcare, a ballot measure committee, contending that the respondents failed to file electronic reports of 10 contributions totaling $1.1 million. In 2000 there was a demand concerning Insurance Commissioner Charles Quackenbush, alleging violations of section 84308, as well as other campaign reporting violations. That matter evolved

into a criminal case and was closed by the FPPC because the Act bars civil lawsuits against a respondent if a prosecutor is maintaining a criminal action.

E. The Streamlined Major Donor Program

At its August 1999 meeting, in the wake of the demands presented by Tony Miller, the Commission approved a streamlined prosecution program that would enable the Commission to more quickly prosecute major donor committees for non-compliance with the Act's disclosure provisions. The program established relatively low fixed penalties for unreported contributions that caused little public harm, and where compliance could be obtained with minimal staff time. The lowest fine was established for donors failing to report contributions of less than $25,000, and a higher fine was set for failure to report contributions of $25,000 to $49,999. Donors that made contributions of $50,000 or more was not included in the original program. The policy underlying the Commission's action was to employ modest fines in appropriate cases to educate the respondents without an unwarranted deterrent effect on rights of political association and speech, and to ensure that "routine" cases would be handled in a fair and consistent manner.

This streamlined program has been revisited by the Commission from time to time. In May of 2000, the Commission eliminated the $49,999 limit on cases eligible for the program. Later, in 2001, the Commission made adjustments to the penalty structures. Since the program's inception, the Commission has processed 506 cases via the streamlined program and entered into stipulated judgments amounting to $1,126,087.

The existence of a streamlined program does not preclude the Enforcement Division from initiating a civil action whenever one may be warranted. Several factors are considered in such decisions, including the nature of the conduct, the size and impact of the unreported contribution, the previous history of violations, the contribution's timing, the donor's intent and, inevitably, staff availability.

Instances where the Commission has opted out of the streamlined program in favor of a civil action include the prosecution of Stephen Bing of Los Angeles who made a single $500,000 contribution to a statewide ballot measure committee, and failed to file a late contribution report. Mr. Bing entered into a $25,000 stipulated settlement when the maximum administrative penalty would have been only $5,000.

In another case, in 2000 and 2002 Caroline Getty had made two $500,000 contributions to the Nature Conservancy Action Fund of California to support two California ballot measures. Her wholly-owned company, Wild Rose LLC, located in the state of Washington, served as an intermediary without disclosing the fact that Ms. Getty was the actual contributor. She did not file major donor statements. A civil action was filed and the respondent stipulated to a $135,000 fine. The administrative fine could not have exceeded $10,000.

In yet another case, the Commission filed suit against P.G.& E. Corporation and San Franciscans Against the Blank Check – No on Measure D Committee, sponsored by P.G. & E.

P.G.& E made two late contributions amounting to $800,000 during the November 5, 2002 general election to this sponsored committee. Neither respondent reported making or receiving the late contributions. Both respondents were represented by the same treasurer and they agreed to a $140,000 fine. Cases typically resolved through the streamlined program do not involve conduct of the sort illustrated in these examples of civil prosecutions.

F. Problems Posed by a Sudden Influx of Demands under section 91007

Demands under section 91007 can impose sudden, large burdens on Commission staff. The law presently requires that the Commission affirmatively respond and file suit within 120 days after receipt of such demands. Any failure to file suit within the allotted time authorizes the complainant to file its own civil action. In practice, staff must within120 days investigate and evaluate each claim, make recommendations regarding the propriety in each case of a civil lawsuit by the Commission, and implement any decision to bring a civil action. In some cases, investigations may be slowed by respondents who were improperly identified, are uncooperative, or are simply difficult to locate – all of which can delay receipt of necessary documents and witness statements in time to present the matter to the Commission within 120 days.

Complainants who bundle a large number of 120-day demands for presentation *en masse* can overwhelm enforcement staff. The workload challenge was well illustrated in the Ryan complaints. Mr. Ryan brought over 930 individual 120-day demands, although approximately 75% of these were never sued or were dismissed by Mr. Ryan in the early stages of the judicial proceeding. The proportion of viable claims was roughly the same in the Tony Miller episode.

Mr. Ryan's actions imposed major disruptions on Enforcement Division case flow. For almost four months, these complaints occupied the time and attention of the Enforcement Division Chief, the Chief Investigator and a staff Investigator, a Political Reform Consultant, and their support personnel. The Enforcement Division is staffed at slightly higher than1983 levels, but has experienced a 250% increase in its case load over the same period. In other words, staff is fully occupied by its day-to-day workload, and does not have reserve capacity to process and investigate a sudden influx of cases amounting to approximately a year's additional work for the personnel who handle major donor violations. These demands caused a diversion of resources from other more pressing cases while, even with its best efforts, staff was unable within the statutory period to separate out potentially meritorious cases from the majority that were simply mistakes. In the end, nearly all respondents were sued by Mr. Ryan.

Mr. Ryan's demands also challenge Commission policies on enforcement of the Act by civil litigation. While some cases had merit and might have been pursued administratively, they did not meet the Commission's criteria for *civil* enforcement because they did not involve large contributions, sufficiently culpable conduct, important legal issues, or a major effect on an election. The initial reaction of the Los Angeles County Superior Court similarly indicates some reservations on the use of scarce and costly judicial resources to adjudicate these cases. The number of dismissals already entered in this case indicate that Mr. Ryan sued hundreds of donors who had in fact filed their reports, causing them to incur court costs and attorney's fees that

could have been avoided had a more orderly investigative process been employed.[3]

A typical first-time failure to report contributions less than $50,000 would result in a fine of $400 per contribution, if the donor meets the criteria for prosecution under the streamlined program, and $5,000 if prosecuted administratively outside the streamlined program. That same donor is liable in a civil lawsuit for up to $50,000, plus attorneys' fees and costs for both defense and prosecution. After balancing the factors pertinent to maximizing compliance with the Act against potentially chilling effects on protected rights of speech and association, the Commission chose not to routinely prosecute such cases to the full extent of the law. Yet as currently written, the law provides large financial incentives for litigants to file major donor cases, which may be inconsistent with the conclusion that rational public policy would typically shun such lawsuits.

II

POLICY CONSIDERATIONS AND OPTIONS

After reviewing the current state of the law, its legislative history, the policies underlying private rights of action and the Commission's streamlined major donor program, together with the uses made of private civil prosecutions, and the institutional problems caused by presentation of large numbers of bundled 120-day demands, the Commission is left to choose, in the first instance, whether to take action to remedy the perceived problems and, if it does wish to act, which course it should follow. The decision *not* to take action may be selected at any time, either because the Commission believes that the disruption caused by matters like the Ryan litigation are too infrequent to merit attention and can be absorbed by staff when they do occur, or if it appears to the Commission that no satisfactory remedy is available. Staff will therefore proceed to outline a range of proposals for curative legislation, as the Commission requested in July.

The problem before us is a problem only when large numbers of demands are presented more or less simultaneously, requiring that Commission staff divert their attention from work in progress to the investigation of an influx of entirely new matters within a short, 120-day period, or expose large numbers of (frequently) innocent donors to the risks and costs of civil litigation.

[3] The Ryan action was originally filed as a single Complaint naming hundreds of defendants, many of whom were later dismissed in a series of individual motions and stipulations. The court itself questioned the propriety of a single lawsuit joining so many defendants whose alleged conduct was not related to any single incident or common nexus of fact. The court transferred the matter to the Complex Litigation Branch, adding to the initial $350 appearance fee a further fees of $550 that will be required of each defendant at the initial status conference in the new court. It is not yet clear whether this lawsuit meets the court's own definition of "complex litigation," or whether the action will be further modified or transferred again. If broken up into hundreds of individual lawsuits, a possibility broached by Judge Minning in July, these cases could severely strain the resources of the court unless they are quickly settled. The outlay on attorneys' fees cannot be assessed on present information, but undoubtedly far exceeds all other costs.

These large, bundled demands have all related to major donor filing violations. There may be several reasons for this. Violations of this nature are relatively easy to detect since the recipients are required to file parallel reports documenting the contributions of their large donors. The potential recovery for a private litigant is high, equaling one half the amount not reported, along with attorneys' fees and costs. Finally, there are many persons who qualify as "major donors," and therefore a large number of potential defendants that can be sued at the same time to increase plaintiff's recovery.

Rules for presenting demands under section 91007 can be modified so that they do not result in the wholesale co-opting of Commission staff resources by outside parties, or undermine Commission enforcement policies. Ways and means for getting at the problems described above include (A) reducing the number of claims that can be presented by any one person or group of persons within a stated time; (B) enlarging the period within which the Commission must respond; (C) changing the nature of the required response; (D) requiring notice to respondents when a demand is made; (E) directing the courts to consider Commission policy when crafting civil judgments; (F) providing a means for preempting existing lawsuit when the Commission decides to intervene in actions already on file; (G) eliminating the "right of first refusal" as a precondition to private lawsuits or; (H) modifying the major donor reporting rules by increasing the reporting threshold. These eight options are surveyed in greater detail below.

A. ***Reducing the number of 120-day demands that may be filed by any one person or group of persons acting in concert:*** Limiting the influx of a large number of claims presented by one person within a short span of time directly addresses the problem of a staff not equipped to cope with sudden, large and unexpected increases in its case load. If history is a reliable guide, such a rule would have no effect on private attorneys general other than those who suddenly announce their presence by filing hundreds of major donor claims. Since two-thirds to three-quarters of such claims ultimately prove groundless, a limit on the number of these claims should result in claimants shifting their focus from quantity to quality – demonstrable, serious violations – further reducing the demands on Commission investigators and the burden on donors wrongly accused. A limit on the number of 120-day demands from a given "watchdog" does not limit the number of complaints such a person may file with the Commission, or the number of violations the Commission can choose to pursue civilly or administratively.

B. ***Enlarging the time within which the Commission must respond:*** This was already tried in 1999, when the original two 40-day periods were combined into a single 120-day timeline for investigation and response. Allowing staff still more time to respond might, depending on the number of claims presented, permit more satisfactory investigations and a rational implementation of Commission policy through the exercise of prosecutorial discretion, handling some violations administratively and others by civil prosecution, as the circumstances of each case may warrant. But an extension of time sufficient to permit staff to absorb a large mass of new cases would, by itself, merely extend the time that staff is diverted from its ongoing workload, and does nothing to protect respondents found by staff not to have violated the law.

C. Changing the nature of the required response: Section 91007 could also be amended to provide that the Commission need not file a civil lawsuit within 120 days following a claim, but that some other action would represent the Commission's determination to prosecute the claim. For example, written notification that the Commission intended to decide a case administratively, or to file a civil action within 12 months, could be deemed sufficient to bar the filing of a private civil lawsuit, unless the Commission fails to issue an administrative adjudication, or to file the civil lawsuit, within the specified period. This kind of rule would make it easier for the Commission to conduct reasonable investigations, and to administratively process (and dismiss) claims where no violation exists. But it would not insulate Commission staff from the obligation to process large masses of ill-founded claims, channeling resources into the prosecution of major donor cases when Commission priorities lie with arguably more serious violations.

D. Requiring notification of respondents when a demand is made: Section 91007 does not require that persons making a demand upon the Commission also notify the respondents. Such notices are sometimes provided voluntarily; in the Ryan matter they took the form of settlement demands. A requirement that the respondents have actual notice of the demand *as a precondition to any subsequent lawsuit* would serve a number of purposes, including fundamental fairness to the respondents. Immediate notice of the claim – backed by threat of imminent civil prosecution – would encourage those improperly accused (the majority of respondents in mass claims) to contact the Commission or the claimant with exculpatory evidence, greatly reducing the number of claims to be investigated. Such a requirement would also save the additional time and labor that investigators are forced to spend when given inaccurate identifying/contact information, a particular problem when staff has little time to complete hundreds of investigations.

E. Directing the courts to consider Commission policy as they craft judicial remedies: Section 91004, which fixes the civil penalty for reporting violations at an amount up to the sum not reported, offers no further guidance to courts on the exercise of their discretion in setting penalties for reporting violations. The range of penalties that may be imposed by a court can therefore run from *de minimis* amounts up to tens of thousands of dollars in the typical case, creating a possibility of wildly varying judgments in different courts across the state. To further policy concerns underlying the streamlined major donor program, section 91004 could be amended to direct courts to take the Commission's fine schedule into account as they deliberate over the proper fines to be imposed in private civil actions. In this proposal, judicial discretion would not be limited beyond the requirement that the Commission's policies be considered in framing civil judgments.

F. Preempting civil actions already on file: Problems associated with a response deadline too short to permit responsible Commission action within the allotted time could be alleviated *to a degree* by permitting the Commission some means of intervention in

private civil actions filed after the expiration of 120 days. Sections 91008 and 91008.5 could be amended to provide, for example, that subsequent administrative adjudications moot the civil lawsuit, or that subsequent civil actions filed by the Commission have trial precedence over prior actions filed by private parties. By itself, however, this approach does not solve the problems faced by a small staff trying to fully and fairly process and prioritize large numbers of claims presented by a private litigant.

G. Eliminating the Commission's "right of first refusal:" All adverse agency impacts associated with large masses of 120-day demands could be ended by eliminating the requirement that private attorneys general obtain Commission authorization prior to initiating civil lawsuits under sections 91004 and 91005. If it appears that the financial incentives to private civil actions are so great as to burden political speech with the threat of unfounded lawsuits when private rights of action are completely untrammeled, the portion of the proceeds awarded to a successful private attorney general could be reduced, or rules providing for award of attorney's fees could be altered to discourage ill-founded prosecutions. But the cost of such a rule would be a loss of agency control over cases in which the Commission has particular interest, whenever a private citizen wins the race to the courthouse.

H. Modification of major donor reporting rules: Because the major donor reporting rules are the source of the massive demands that have made under section 91007, any action that reduces the number of colorable major donor claims would likely have some effect in reducing the size of such mass 120-day demands in the future. For example, if the reporting threshold for major donors were raised to $50,000, all claims against donors who total contributions were lower than that sum would (presumably) be filtered out of any mass of 120-day demands presented to the Commission.

III

RECOMMENDATIONS

A. Recommendations of the Bipartisan Commission

As a preliminary note, staff recognizes that the Bipartisan Commission has made four specific recommendations for legislation in this area, as described at Section I C above. Staff has considered these recommendations carefully, but concludes that three of them would not provide an effective remedy for the problems that have surfaced in the past few years. Recommendation No. 25, which would limit private rights of action to "serious" violations of the Act, expressly relies for its effect on the vagueness of the term "serious." To leave that term undefined would guarantee that the courts would define it in the course of litigation, and there is no reason to believe that the courts would offer an understanding of that term agreeable to the intent of the Bipartisan Commission. Indeed, Recommendation No. 26 was expressly intended to overturn by legislation a series of judicial decisions that had, in the view of the Bipartisan Commission, wrongly interpreted the already-clear attorneys' fees provision of section 90012. Staff does not believe that the language proposed by the Bipartisan Commission in

Recommendation No. 26 will yield the desired result, because it does not make the statute any more clear than it is now.

Recommendation No. 28 calls for preempting citizen lawsuits when the Commission has issued a "warning letter" to the respondent. This recommendation does not address the workload problems associated with mass 120-day demands, and does not alleviate the burdens on innocent respondents. Because it would undermine the protection of the public interest furthered by the private right of action with corresponding benefit only to respondents who presumptively *have* violated the Act, staff believes that the Commission should focus its efforts on remedies more closely tailored to the problems at hand. Recommendation 27 is a variant of Option C, which will be considered below.

B. Options recommended by staff

As the shortest path to a real solution to the difficulties posed by mass claims presented under section 91007, staff recommends a combination of Options A, D, and E. Option A is the most direct means of alleviating the institutional challenges imposed by hundreds of 120-day demands presented together in a large package of often ill-sorted claims. Limiting the number of 120-day demands that may be presented by any person (to perhaps ten or twenty within any 12-month period) deters only the occasional entrepreneurial "project" focused on easily-found reporting violations offering a lucrative recovery to the claimant, obtained at the expense of an enforcement program designed by the Commission to educate rather than to frighten off donors. A limitation of this sort does nothing, or course, to discourage citizens from filing complaints for the Commission to investigate in the normal course of its activities. Staff does not anticipate that a restriction of this sort would result in any overall reduction in enforcement activities.

Option D, a requirement that the person presenting a 120-day demand simultaneously provide actual notice to the accused, as a precondition of any subsequent lawsuit, would tend to reduce the burden of investigation by prompting respondents to come forward early if they the have exculpatory evidence that would obviate the need of further investigation. If limiting the number of demands encourages claimants to focus on provable violations, the benefits of notice would be limited to encouraging the claimant to accurately identify respondents, fundamental notions of fairness, and the possibility of early settlement which, by reducing transaction costs associated with litigation, is generally regarded as a *per se* benefit in the legal community. Staff has been able to articulate no known disadvantage to providing early notice to the accused, apart from the burden on the claimant to ensure that actual notice is in fact timely provided.

Option E anticipates that private civil actions will continue as part of the legal landscape. This provision is designed to alert the courts to the Commission's policy of balancing the public interest in compliance with the Act against potentially deterrent effects of punitive fines that would discourage donors from contributing to political discourse.

C. Options not recommended by staff

If private attorneys general are no longer able to present hundreds of demands at a time, there would be no pressing need to extend the response time for 120-day demands (Option B). Option C is a related device that would permit the Commission to defer the finality of a 120-day demand, by amending section 91007 to bar private civil lawsuits if the Commission announces that it will pursue (or may pursue) the claim by other means. On the whole staff does not believe that such an option is necessary if the statute eliminates massive bundled demands, encouraging commercial entrepreneurs to focus on large and egregious cases. The argument against Option C is that it would offer the Commission an option to alter the conduct or outcome of particular private actions merely by "punting" into the future the decision now required by the statute. This option reduces the incentive to private civil actions by adding an element of risk to a prospective plaintiff's decision to investigate and present demands under section 91007.

The Enforcement Division does not concur in this judgment, however, arguing that there may be circumstances which will prevent a full investigation of a particular case within 120 days, and that some cases may then be "remanded" to private prosecution with potential liability (including attorneys' fees and costs for both parties) far beyond any penalty that the Commission would impose, when all the facts were known. The Enforcement Division believes in particular that the interests of justice and Commission policy are best served by developing a mechanism that permits the Commission to "stop the clock" by initiating its own administrative proceeding without the requirement that the proceeding be concluded within 120 days.

Option F would give the Commission authority to interrupt ongoing private litigation after declining to take any action in the first instance. This approach undermines the private right of action without addressing the problems identified in this memorandum. By contrast Option G, which would eliminate the entire "right of first refusal" mechanism, would certainly put an end to the institutional problems associated with demands under section 91007, but it would also end all Commission oversight of such litigation. The problems associated with 120-day demands can be resolved without abandoning the field altogether. Option H was added only for the sake of completeness. Staff does not recommend reduction in its major donor caseload when that reduction is obtained by raising the filing threshold until few donors remain subject to the law. Legislation implementing Options A, D, and E provides the necessary relief at minimal cost to the public interest.

ATTACHMENT

The following Attachment offers language illustrating the recommended amendments.

§ 91007. Procedure for Civil Actions.

(a) Any person, before filing a civil action pursuant to Sections 91004 and 91005, must first file with the civil prosecutor a written request for the civil prosecutor to commence the action. The request shall include a statement of the grounds for believing a cause of action exists, and must include an affirmation that a copy of the written request has been provided to the person or persons against whom a cause of action is said to exist. No person, or group of persons acting in concert, shall file more than 10 such written requests within any 12 month period. The civil prosecutor shall respond to the person in writing, indicating whether he or she intends to file a civil action.

(1) If the civil prosecutor responds in the affirmative and files suit within 120 days from receipt of the written request to commence the action, no other action may be brought unless the action brought by the civil prosecutor is dismissed without prejudice as provided for in Section 91008.

(2) If the civil prosecutor responds in the negative within 120 days from receipt of the written request to commence the action, the person requesting the action may proceed to file a civil action upon receipt of the response from the civil prosecutor, provided that the person against whom a cause of action is asserted has actually and timely received the notice required in subdivision (a), and further provided that the person filing the action, or persons acting in concert with that person, has not filed 10 or more civil actions under this section within the previous12 months. If, pursuant to this subdivision, the civil prosecutor does not respond within 120 days, the civil prosecutor shall be deemed to have provided a negative written response to the person requesting the action on the 120th day and the person shall be deemed to have received that response.

(3) The time period within which a civil action shall be commenced, as set forth in Section 91011, shall be tolled from the date of receipt by the civil prosecutor of the written request to either the date that the civil action is dismissed without prejudice, or the date of receipt by the person of the negative response from the civil prosecutor, but only for a civil action brought by the person who requested the civil prosecutor to commence the action.

(b) Any person filing a complaint, cross-complaint or other initial pleading in a civil action pursuant to Sections 91003, 91004, 91005, or 91005.5 shall, within 10 days of filing the complaint, cross-complaint, or initial pleading, serve on the Commission a copy of the complaint, cross-complaint, or initial pleading or a notice containing all of the following:

(1) The full title and number of the case.

(2) The court in which the case is pending.

(3) The name and address of the attorney for the person filing the complaint, cross-complaint, or other initial pleading.

(4) A statement that the case raises issues under the Political Reform Act.

(c) No complaint, cross-complaint, or other initial pleading shall be dismissed for failure to comply with subdivision (b).

§ 91004. Violations of Reporting Requirements; Civil Liability.

Any person who intentionally or negligently violates any of the reporting requirements of this title shall be liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount not more than the amount or value not properly reported. In exercising its

discretion to set the amount of a judgment under this section, the court shall take into consideration any rules and regulations of the Commission applicable to similar violations.